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SUPREME COURT OF THE UNITED STATES

October Term, 1956

LIONEL C. CARSON, INFANT, BY HIS NEXT FRIEND, MARTIN A. CARSON, ET ALS., *Petitioners,*

versus

HONORABLE WILSON WARLICK, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No._____

LIONEL C. CARSON, Infant, By His Next Friend, MARTIN A. CARSON, ET ALS., Petitioners,

versus

HONORABLE WILSON WARLICK, United States District Judge for the Western District of North Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the Order and Decision of the United States Court of Appeals for the Fourth Circuit entered in the above case on November 14, 1956.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, (R., Opinion of the Court), is reported at ..... F. 2d ....., and is copied in the Appendix to this Petition as Appendix "A." The Order of the District Court for the Western District of North Carolina is copied in the Appendix to this Petition as Appendix "C." The Administrative Ruling which precipitated the instant controversy is copied herein as Appendix "F" to this Petition.

JURISDICTION

The Order and Opinion of the Court of Appeals for the Fourth Circuit are dated November 14, 1956, and both were entered on the day abovementioned. Copies of both the Order and the Opinion of said Court are copied in the Appendix to this Petition as Appendix "A" and "B" respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

In the Court of Appeals below, petitioners sought a writ of mandamus, which petitioner prayed to be directed to the United States District Court for the Western District of North Carolina, under the terms of which, among other things, the District Court would be directed to vacate an order of stay of proceedings which it had entered and to proceed with petitioners' cause as though petitioners had either exhausted all administrative remedies or had no such remedies to exhaust as a prerequisite to obtaining federal injunctive relief. The Court of Appeals denied the petition for writ of mandamus. The questions presented are:

1. Whether the North Carolina General Statutes 115-178 *et seq.* provide an adequate administrative remedy which petitioners are required to exhaust prior to seeking federal injunctive relief?

2. Whether petitioners have in fact exhausted such administrative remedies as are applicable to them?

3. Whether the public school authorities have a subsisting duty, prior to the entry of judicial decrees, to provide Negro public school children with public school education on a racially non-segregated basis?

4. Whether the Court of Appeals should have entered a writ of mandamus directing the District Court to vacate its stay of proceedings and to proceed to judgment in petitioners' cause?

STATUTES INVOLVED

The pertinent portions of North Carolina General Statutes 115-176 through 115-179 are set forth and copied in the Appendix to this Petition as a footnote to the Opinion of the Court below in Appendix "A." North Carolina General Statutes 115-176 through 115-179, as amended July 27, 1956, during the pendency of the instant cause, are set forth and copied as Appendix "D." However, the amendments make no changes relevant to this Petition.

STATEMENT

The instant action was filed in the United States District Court for the Western District of North Carolina on August 10, 1953, because of alleged racial segregation and discrimination in the matter of public education in McDowell County, North Carolina. Your infant petitioners alleged that they "are residents of and domiciled in and around the Town of Old Fort, McDowell County, North Carolina." Your petitioners also alleged that they were required by the school authorities, because of their race and color, to attend public school at Marion, North Carolina, which is some fourteen or fifteen miles away, while children of the Caucasian or white race, who were residents of and domiciled in and around the Town of Old Fort, McDowell County, North Carolina, were provided public school education in the Town of Old Fort. Your petitioners also particularly alleged that the defendant County Board of Education maintained and operated its public school system "on a separate segregated basis, with white children attending some schools exclusively, and Negro children forced to attend one school maintained for them exclusively." These allegations were admitted in the defendant board's answer to the original complaint, (Record, Exhibit "B," Pages 26 and 27).

After the 1955 decision by this Court in *Brown et al. vs. Board of Education* and allied cases, 349 U.S. 294, 75 S. Ct. 753, 99 L. ed. 653, the District Court presumed to dismiss your petitioners' action as being moot. On appeal to the Court of Appeals for the Fourth Circuit the Judgment of dismissal was vacated and the

cause remanded with directions, *Carson et al. vs. Board of Education of McDowell County,* 227 F. 2d 789. The directions given to the District Court by the Court of Appeals for consideration of your petitioners' cause was that the District Court "consider it in the light of the decision of the Supreme Court in the school segregation case and of the North Carolina statute above mentioned and with power to stay proceedings therein pending the exhaustion of administrative remedies under the statute and to order a repleader if this may seem desirable," 227 F. 2d 789, at Page 791. The "statute" mentioned in the Court of Appeals' directions is North Carolina 115-178 *et seq.* which appears in the Appendix to this Petition as Appendix "D."

On the 26th day of July, 1956, when the instant cause was before the District Court on motion for leave to file supplemental pleading, the District Court entered a stay of proceeding, holding that your petitioners had not exhausted administrative remedies under North Carolina General Statutes 115-178 *et seq.* Shortly thereafterwards, to wit, on the 15th day of August, 1956, your petitioners filed a petition in the Court of Appeals for the Fourth Circuit in which they alleged, among other things, that they were still aggrieved by the matters shown in their original complaint, that they had exhausted such administrative remedies as were available to them and, in the alternative, that North Carolina General Statutes 115-178 *et seq.* provided no adequate remedy for them, (R., Application for Writ of Mandamus, Pages 1 to 18). To their petition for Writ of Mandamus your petitioners attached a copy of the Record in *Joyner et al. vs. Board of Education of McDowell County,* 244 N.C. 164, 92 S.E. 2d 795, in which their protracted but futile attempt to secure relief via North Carolina General Statutes 115-178 *et seq.* is chronicled, (R., Exhibit "A" to Application for Writ of Mandamus). See Appendix "E" of this Petition. Upon denial of the Writ of Mandamus, your petitioners now petition this Court to issue the Writ of Certiorari to review the Order and Decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court because of numerous impelling reasons, all of which are obvious from a reading of the text and some of which are enumerated immediately below:

1. The decision of the Court of Appeals for the Fourth Circuit has answered two important questions of federal law in a manner directly in conflict with decisions of the Courts of Appeals for the Fifth, Sixth and Eighth Circuits, viz., *Brown et al. vs. Edwin L. Rippy,* (C.A., 5th) 233 F. 2d 796; *Jackson et al. vs. O. C. Rawdon as President of the Board of Trustees, Mansfield Independent School District, et al.,* (C.A. 5th) Civ. No. 15927, 235 F. 2d 93, 1 Race Rel. L. Rep. 655; *Clemons et al. vs. Board of Education of Hillsboro, Ohio, et al.,* (C.A. 6th) 228 F. 2d 853; *Herbert Brewer et al. vs. Hoxie School District No. 46* (C.A. 8th), 238 F. 2d 91, decided October 25, 1956. The decision below is grounded upon two fallacious notions: (1) that the doctrine of exhaustion of administrative remedies has the same vigor in public school desegregation actions as in other actions and, (2) that the school boards have no pre-existing and peremptory duty, apart from and prior to the entry of judicial decrees, to provide Negro public school pupils with public school education on a non-segregated basis. In *Brown et al. vs. Edwin L. Rippy, supra; Clemons et al. vs. Board of Education of Hillsboro, Ohio, et al., supra;* and *Jackson et al. vs. O. C. Rawdon, supra,* the Courts of Appeals of the Fifth and Sixth Circuits have declined to give vigor or notice to the doctrine of exhaustion of administrative remedies, and in those cases, as well as in *Herbert Brewer et al. vs. Hoxie School District No. 46, supra,* the Courts of Appeals of the Fifth, Sixth and Eighth Circuits have recognized and applied to the factual situations involved a pre-existing and peremptory duty on the part of the defendant school boards to de-segregate the public schools in their charge. Again, the instant decision is diametrically in conflict with the well reasoned opinion of the United States District Court in the Fifth Circuit upon a similar set of facts. (*Bush vs. Orleans Parish School Board*, U. S. D. C., La. 138 F. Supp. 336).

2. The decision of the Court of Appeals for the Fourth Circuit is in irreconcilable conflict with the decisions of this Court in *Brown et al. vs. Board of Education* and allied cases, 1954: 347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873; 1955: 349 U.S. 294, 75 S. Ct. 753, 99 L. ed. 653. In the abovementioned decisions this Court has (1) enjoined school authorities to de-segregate public schools with "all deliberate speed," (2) sanctioned the application of class action under F.R.C.P., Rule 23(a)(3), (3) allowed some leeway for statutory changes designed to solve the problems necessitated by the decisions in the so-called Segregation Cases and (4) declared the right of Negro complainants to be admitted "to public schools as soon as practicable on a non-discriminatory basis." On the other hand and by way of contrast and distortion of the above enumerated principles, the opinion of the Court of Appeals for the Fourth Circuit has (1) *not* enjoined the school authorities to de-segregate with "all deliberate speed," but, through the medium of a nugatory, wearisome and cumbersome state enacted administrative procedure, placed the burden of de-segregating public schools upon each Negro child involved rather than upon school authorities, (2) emaciated the class action under F.R.C.P., Rule 23(a)(3) by reducing the class in federal court to include only those complainants who have personally exhausted the so-called state administrative remedies, (3) sanctioned a statutory innovation, the necessary and inevitable operation of which is to thwart and delay desegregation of the public schools in North Carolina, and (4) denied to Negro complainants the right to be admitted "to public school as soon as practicable on a nondiscriminatory basis" by requiring that each plaintiff, before seeking federal injunctive relief, individually tread the fruitless and squirrel-cage like procedure provided under North Carolina General Statutes 115-178 *et seq.* In short, while this Court in the *Brown* and allied cases cited above has declared that the practice of racial segregation in public school education is illegal and a deprivation of the "equal protection of the laws guaranteed by the Fourteenth Amendment," the Court below has attempted to narrow this constitutional proposition to the bare "right of these school children to be admitted to the schools of

North Carolina without discrimination on the ground of race," without taking notice of the correlative duty of school authorities.

3. The Court of Appeals for the Fourth Circuit, by entry of the opinion and order below, has reached a monstrous conclusion of circuit-wide impact in an important area of American life—the field of education—by pyramiding a series of inapplicable and conflicting principles of federal law.

(a) The opinion below applies the doctrine of exhaustion of administrative remedies to a civil rights action. In doing this it has passed upon a question heretofore not passed upon by this Court. It has also *sub silentio* reversed itself. See *Carter et al. vs. School Board of Arlington County, Virginia,* (C.C.A. 4th), 182 F. 2d 531. More importantly, in applying this doctrine to the facts of the instant case the Court below has done so in a ritualistic and formalistic manner, inasmuch as the entire record is ample attestation of the fact that your petitioners did substantially, realistically and actually exhaust so much of the purported administrative remedy as the Court below has held to be applicable to them. See *Joyner vs. McDowell County Board of Education,* 244 N.C. 164, 92 S.E. 2d 795; Exhibit "A," "C-1" and "C-2" of the Record before this Court and Appendices "E" and "F" to this Petition. Compare *Procter & Gamble Distributing Company vs. Sherman et al.,* (D. C., S.D.N.Y.) 2 F. 2d 165. The opinion below reads in part: "While the presentation of the children at the Old Fort school appears to have been sufficient as the first step in the administrative procedure provided by statute, the prosecution of a joint or class proceeding before the school board was not sufficient under the North Carolina statute as the Supreme Court of North Carolina pointed out in its opinion; and not until the administrative procedure before the board had been followed in accordance with the interpretation placed upon the statute by that court would applicants be in position to say that administrative remedies had been exhausted." Again, the Court below has erroneously held that the question of whether a state administrative remedy has been exhausted is a question of state law and that the federal courts, on

this question, are bound by the decisions of the state courts. Compare *Lane vs. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. ed. 1281; *Procter & Gamble Distributing Company vs. Sherman, supra.*

(b) The opinion below has apparently confused the principles of legitimate exercise by administrative agencies of delegated legislative process with the principles of the doctrine of exhaustion of administrative remedies. The opinion states: "The authority given the boards 'is of a fact finding and administrative nature and hence is lawfully conferred.'" The cases cited in the opinion for this proposition are cases wherein this Court has sanctioned ruling making by the administrative agencies, or finding of fact by administrative agencies preparatory to putting a previously declared law into effect, or legitimate exercise of police power by legislatures through administrative agencies. See *Opp. Cotton Mills vs. Administrator of Wage and Hour Division of Dept. of Labor*, 312 U.S. 126, 61 S. Ct. 524, 85 L. ed. 624, which is principally relied upon by the Court below. None of the cases cited are cases wherein the constitutional rights of an applicant to a hearing and of procedural due process were involved, but all were cases of approved delegation of legislative power. But if the Court below is correct in holding that the school boards are exercising *delegated legislative* power in hearings on application by complainants in the enrollment or assignment of public school pupils, and are merely finding facts preparatory to putting a statute into effect, then North Carolina General Statutes 115-178, *et seq.*, is no administrative remedy at all, and talk of exhaustion of administrative remedies under North Carolina General Statutes 115-178 *et seq.* is totally irrelevant. Compare *Opp. Cotton Mills v. Administrator of Wage and Hour Division of Dept. of Labor, supra.* Moreover, the standards set out in North Carolina General Statutes 115-178 *et seq.* are too vague, subjective and arbitrary to support the exercise of delegated legislative power, assuming that the Court below is correct in this legal conclusion. Compare *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. ed. 446; *People use of Moore vs. J. O. Beckman & Co.*, 347 Ill. 92, 179 N.E. 435.

(c) Nevertheless, it is abundantly clear that North Carolina General Statutes 115-178 *et seq.* purports to endow and could only endow the school boards with administrative power in the matter of enrollment and assignment of pupils to public schools as contrasted with delegated legislative power. See *Chung Yim vs. United States,* (C.C.A. 8th), 78 F. 2d 43, Cert. denied 296 U.S. 627, 56 S. Ct. 150, 80 L. ed. 446; *Motter vs. Derby Oil Co.,* (C.C.A. 8th), 16 F. 2d 717, Cert. denied 273 U.S. 762, 47 S. Ct. 477, 71 L. ed. 879. The business of assigning and enrollment of public school children in school is merely a matter of school management and of execution of school law and has none of the attributes of legislation, 42 Am. Jur. (Public Administrative Law) Sections 29 and 36; *Chung Yim vs. United States, supra; Motter vs. Derby Oil Co., supra; Drumheller vs. Local Board No. 1 et al.,* (C.C.A. 3rd), 130 F. 2d 610; *Morgan vs. Tenn. Valley Authority,* (C.C.A. 6th), 115 F. 2d 990. Hence, complainants under the assignment plan are entitled to all of the rights of procedural due process.

(d) The Court below has erroneously declined to weigh North Carolina General Statutes 115-178 *et seq.* for procedural due process, presumably because of its mistaken notion that the enactment clothed the school authorities with delegated legislative power as contrasted with administrative power. But if the power given to the board is administrative, as herein contended, and if the North Carolina enactment purports to provide an administrative remedy, then the enactment is void on its face, in that it is a grant on its face of arbitrary power to the administrative agencies involved, *Lowell v. Griffith,* 303 U.S. 444, 58 S. Ct. 666, 82 L. ed. 949; *New Jersey State Board of Optometrists et al.,* 5 N.J. 412, 75 A. 2d 867, 22 A.L.R. 2d 929; *Yick Wo. vs. Hopkins,* 118 U.S. 358, 30 L. ed. 356, 6 S. Ct. 1064; *Connally vs. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. ed. 322. Moreover, the purported standards, as presumably provided in the statute, allow for and require the consideration by the school boards of illegal matters in passing upon the complainants' constitutional rights in so far as the statute speaks of "the best interests of such

child," *United States vs. Coplan,* (C.A. 2d) 185 F. 2d 629, 28 A.L.R. 2d 1041, Cert. denied, 342 U.S. 920, 72 S. Ct. 362, 96 L. ed. 690; *McKissick vs. Carmichael,* (C.C.A. 4th) 187 F. 2d 949; in so far as the statute forbids the applicant's admission to a school if it would interfere "with the proper administration of such school or with the proper instruction of pupils there enrolled," *Jackson et al. vs. O. C. Rawdon, supra; Clemons vs. Board of Education of Hillsboro Ohio, supra; Hoxie School District No. 46 of Lawrence County et al. vs. Herbert Brewer, et als., supra;* and in so far as the statute forbids the applicant's admission to a school if it would endanger the "health or safety of the children there enrolled." See the *Hoxie, Jackson* and *Clemons* cases cited above and also *Yick Wo. vs. Hopkins, supra; Brown vs. Board of Education, supra,* and allied cases.

(e) Finally, the Court below seems to be oblivious to the fact that the so-called administrative remedy must, in petitioners' action, be administered by the very authorities against whom your petitioners complain of illegal racial segregation and discrimination. See North Carolina General Statutes 115-178 *et seq.* At the very instance of complaint of racial segregation and discrimination, if petitioners' allegations are true, the administrative agencies who are commissioned to administer the remedy, are already in flagrant violation of petitioners' constitutional rights and of their rights under 42 U.S.C. 1983. The administrative agencies are also, under conditions mentioned above, in open violation of 18 U.S.C. 242. To hold, as the Court below has held, that petitioners are to be remitted to a remedy administered by the confiscators of their constitutional rights and by violators of 18 U.S.C. 242 is to judicially remit petitioners to the very abuses which are interdicted by the Fourteenth Amendment to the United States Constitution and to sheer legal formalism. *Procter & Gamble Distributing Co. vs. Sherman et al., supra.*

4. The questions presented by this case are of great and recurring significance in the matter of interpreting this Court's decisions in the so-called public school segregation cases in the Fourth Circuit, as well as in other Circuits. A "dictum" of the Court of

Appeals for the Fourth Circuit, when this instant cause was previously before that Court during the Fall Term, 1955, (*Carson et al. vs. Board of Education,* 227 F. 2d 789), relative to the applicability of the doctrine of exhaustion of administrative remedies to cases such as this, has been made the law of the case in *Hood vs. Board of Trustees of Sumter County School District No. 2, Sumter County, South Carolina, et al.,* (C.A. 4th) 232 F. 2d 626; *Robinson et al. vs. Board of Education of St. Mary's County et al.,* (U.S.D.C., Md.) Civil Action No. 8780, 143 F. Supp. 481. This same "dictum" has been applied with formalistic vigor to the instant proceeding. Again, the Court of Appeals for the Fourth Circuit has recently approved of an extension of its formalistic application of the doctrine of exhaustion of administrative remedies to proceeding aimed at enforcement of injunctive decrees already entered, *School Board of the City of Charlottesville et al. vs. Doris Marie Allen et al.,* No. 7303, and *County School Board of Arlington County, Virginia, vs. Clarissa S. Thompson et al.,* No. 7310, (C.A. 4th) ..... F. 2d ..... The serious questions of the interpretation of the Fourteenth Amendment in school cases and of the applicability of the doctrine of exhaustion of administrative remedies to this and other civil rights actions of similar import make this a case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX "A"

LIONEL C. CARSON, Infant, By His Next Friend, MARTIN A. CARSON, Et Als., Petitioners,

versus

HONORABLE WILSON WARLICK, United States District Judge for the Western District of North Carolina, Respondent.

ON PETITION FOR WRIT OF MANDAMUS

United States Court of Appeals, Fourth Circuit.

(Argued October 1, 1956. Dated November 14, 1956.)

PARKER, Chief Judge:

This is an application for a writ of mandamus in the case wherein Negro children of Old Fort in McDowell County, North Carolina, allege that the Board of Education of that county is exercising discrimination on the grounds of race in refusing to admit them to schools maintained in the town of Old Fort. When the case was before us on appeal, we held that the court below erred in dismissing the case as moot, but ruled that, in further proceedings therein, the court below should give consideration to whether administrative remedies provided by the North Carolina statute of March 30,

1955,* had been exhausted. *Carson v. Board of Education of McDowell County,* 4 Cir. 227 F. 2d 789. After our decision, the Supreme Court of North Carolina, in an action to which two of the applicants here were parties, rendered a decision on May 23, 1956, construing the act of March 30, 1955 (*Joyner v. McDowell County Board of Education,* 244 N.C. 164, 92 S.E. 2d 795) in which it said:

> "With respect to the provisions of G.S. sec. 115-178, this Court construes them to authorize the parent to apply to the appropriate public school official for the enrollment of his child or children by name in any public school within the county or city administrative unit in which such child or children reside. But such parent is not authorized to apply for admission of any child or children other than his own unless he is the guardian of such child or children or stands in loco parentis to such child or children. In the event a parent, guardian or one standing in loco parentis of several children should apply for their admission to a particular school, it is quite possible that by reason of the difference in the ages of the children, the grades previously completed, the teacher load in the grades involved, etc., the school official might admit one or more of the children, and reject the others. The factors involved

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See General Statutes of North Carolina as follows:

*Sec. 115-176. County and city boards authorized to provide for enrollment of pupils.—The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this article, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education. (1955, c.366, s.1.)

necessitate the consideration of the application of any child or children individually and not en masse. Any interested parent, guardian or person standing in loco parentis to such child or children, whose application may be rejected, may appeal to the appropriate board for a hearing in accordance with the rules and regulations established by such board. Furthermore, if the board denies the application for admission of such child or children, the aggrieved party may appeal in the manner prescribed by statute, G.S. sec. 115-179, to the superior court, where the matter shall be heard de novo before a jury in the same manner as civil actions are tried therein.

"Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing in loco parentis to any child or children for the admission of such child or children to a particular school, must be prosecuted in behalf of the child or children by the interested parent, guardian or person standing in loco parentis to such child or children respectively and not collectively.

* * * *

"An additional reason why this proceeding was properly dismissed is that while it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not

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Sec. 115-177. Authority to be exercised for efficient administration of schools, etc.; rules and regulations.—In the exercise of the authority conferred by sec. 115-176 upon the county or city boards of education, each such board shall provide for the enrollment of pupils in the respective public schools located within such county or city administrative unit so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils. In the exercise of such authority such board may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes. (1955, c.366, s.2.)

based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is in effect an application for mandamus, requiring the immediate integration of all Negro pupils residing in the administrative unit in which the Old Fort school is located, in the Old Fort school. Such a procedure is neither contemplated nor authorized by statute. Therefore, the appeal is dismissed."

The applicants did not attempt to comply with the provisions of the statute as so interpreted by the Supreme Court of North Carolina, but on July 11, 1956, counsel who are representing them before this court wrote a letter to the secretary of the Board of Education, inquiring what steps were being taken for the admission of Negro children to the Old Fort school. The secretary replied that "inasmuch as no Negro pupil has made application, nor has any parent or person standing in loco parentis made application for any Negro child to attend school in the town of Old Fort for

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Sec. 115-178. Hearing before board upon denial of application for enrollment.—The parent or guardian of any child, or the person standing in loco parentis to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which such child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school. (1955, c.366, s.3.)

the school year 1956-57, the Board had had no cause to take any action in this connection."

Upon receiving this reply, applicants here, plaintiffs in the court below, on the 12th day of July 1956 moved in the action there pending to file a supplemental complaint in which, without alleging compliance with the requirements of the North Carolina statute as interpreted by the Supreme Court, they asked a declaratory judgment and injunctive relief with respect to their right to attend the Old Fort school. The District Judge denied the motion on the ground that plaintiffs had not exhausted their administrative remedies and stayed proceedings in the cause until same should be exhausted, but stated that, as soon as it was made to appear that they had been exhausted, he would grant such relief as might be appropriate in the premises, saying:

> "(1) That obedient to the per curiam decision of the Court of Appeals for the Fourth Circuit, 227 F. 2d 789, this Court has up until this time and will consistently hereafter consider this case in the light of the decision of the Supreme Court of the United States in the so-called School Segregation Case, and of the North Carolina statute chapter 366 Laws 1955,

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Sec. 115-179. Appeal from decision of board.—Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

G.S. 115, 176-179, set out in the opinion in the 227 Fed. Reporter 2d 789, and has consistently asserted and now reaffirms that it is the duty under the authority granted to stay all proceedings herein and to cause the matter to remain continuously at issue on the docket until it should be made to appear that the plaintiffs herein or some of them have exhausted the administrative remedies which are provided for them or some of them or any of them under the above statute, and that when such is made to appear the Court will immediately entertain a motion by counsel for the plaintiffs or some of them or any of them to file amendment to the complaint or to replead, indicating that the rights to which they are entitled have been denied them on account of their race or color, and immediately thereafter, and within twenty days, will require an answer to be filed thereto and will set the case down with a peremptory setting as the first cause to be disposed of, either at the regular term or some other called term of this court, dependent upon the requests of the parties or those who appear for them as counsel in said cause."

Upon the denial of the motion, application for writ of mandamus was filed here to require the District Judge to vacate the order staying proceedings, to allow the supplemental pleading to be filed and to proceed with the cause "as though the Pupil Enrollment Act had never been enacted."

We think it clear that applicants are not entitled to the writ of mandamus which they ask, for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies have been exhausted. (See 227 F. 2d at 790.) In the supplemental complaint which they proposed to file in the court below they did, indeed, allege that on August 24, 1955, they had presented their children at the Old Fort school for admission, that they were denied admission on the ground of race and that on August 27 they and certain other Negroes had filed a joint petition

with the school board asking that their children be admitted to the school. This petition was denied by the Board in January 1956 and it was an appeal from this order of the Board to the Superior Court and thence to the Supreme Court of the State in which the decision of the Supreme Court of May 23, 1956 was rendered. While the presentation of the children at the Old Fort school appears to have been sufficient as the first step in the administrative procedure provided by statute, the prosecution of a joint or class proceeding before the school board was not sufficient under the North Carolina statute as the Supreme Court of North Carolina pointed out in its opinion; and not until the administrative procedure before the board had been followed in accordance with the interpretation placed upon the statute by that court would applicants be in position to say that administrative remedies had been exhausted.

It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act, G.S. 115-177, and require the enrollment to be made "so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils enrolled, and the health, safety and general welfare of such pupils." Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in *Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor,* 312 U.S. 126, 145: "The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory

command is to be effective." The authority given the boards "is of a fact finding and administrative nature, and hence is lawfully conferred." *Sproles v. Binford,* 286 U.S. 374, 397. See also *Douglas v. Noble,* 261 U.S. 165, 169-170; *Hall v. Geiger Jones Co.,* 242 U.S. 539, 553-554; *Mutual Film Corp. v. Hodges,* 236 U.S. 248; *Mutual Film Corp. v. Ohio Industrial Com'n,* 236 U.S. 230, 245-246; *Red "C" Oil Mfg. Co. v. North Carolina,* 222 U.S. 380, 394.

Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown et al. v. Board of Education, et al.,* 349 U.S. 294, 299:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. *Lane v. Wilson,* 307 U.S. 268, 274. Furthermore, if administrative remedies before a school board have been ex-

hausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. *Henderson v. United States,* 339 U.S. 816, 824. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. We are dealing here, of course, with the administrative procedure of the state and not with the right of persons who have exhausted administrative remedies to maintain class actions in the federal courts in behalf of themselves and others qualified to maintain such actions.

Mandamus Denied.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7281.

LIONEL C. CARSON, Infant, By His Next Friend, MARTIN A. CARSON, Et Als., Petitioners,

vs.

HONORABLE WILSON WARLICK, United States District Judge for the Western District of North Carolina, Respondent.

ON PETITION FOR A WRIT OF MANDAMUS

This cause came on to be heard on the petition of Lionel C. Carson, infant, by his next friend, Martin A. Carson, and others, for a writ of mandamus; answer of McDowell County Board of Education; brief and supplement to brief in support of petition; and the cause was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, for the reasons set forth in the opinion of the Court filed herein, that the petition for a writ of mandamus be, and it is hereby, denied.

November 14, 1956.

JOHN J. PARKER,

Chief Judge, Fourth Circuit.

A true copy,

Teste:

RICHARD M. F. WILLIAMS, JR., Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

LIONEL C. CARSON, An Enfant, by his Next Friend, MARTIN A. CARSON, et al.,

Plaintiffs,

CIVIL No. 1341.

v.

BOARD OF EDUCATION OF McDOWELL COUNTY, a body Corporate,

Defendant.

July 26, 1956.

THE COURT: From the bench the Court dictates the following to be considered along with that which has already been said by counsel for the plaintiffs and counsel for the defendant, Board of Education of McDowell County, and by the Court, in discussing the position of the Court and counsel at this time with respect to this case:

(1) That obedient to the per curiam decision of the Court of Appeals for the Fourth Circuit, 227 Fed. 2. 789, this Court has up until this time and will consistently hereafter consider this case in the light of the decision of the Supreme Court of the United States in the so-called School Segregation Case, and of the North Carolina Statute Chapter 366 laws 1955, G.S. 115, 176-179, set out in the opinion in the 227 Fed. Reporter 2d 789, and has consistently asserted and now reaffirms that it is the duty under the authority

granted to stay all proceedings herein and to cause the matter to remain continuously at issue on the docket until it should be made to appear that the plaintiffs herein or some of them have exhausted the administrative remedies which are provided for them or some of them or any of them under the above statute, and that when such is made to appear the Court will immediately entertain a motion by counsel for the plaintiffs or some of them or any of them to file amendment to the complaint or to replead, indicating that the rights to which they are entitled have been denied them on account of their race or color, and immediately thereafter, and within twenty days, will require an answer to be filed thereto and will set the case down with a peremptory setting as the first cause to be disposed of, either at the regular term or some other called term of this court, dependent upon the requests of the parties or those who appear for them as counsel in said cause.

(2) This Court is of the opinion that Raymond Greenlee and James Bryson, who are parties plaintiff to the action, in this court, and Albert Joyner and Lucille Lytle, who joined them in the action against the Board of Education of McDowell County in the civil action which was decided in the opinion appearing in 244 N. C. page 164, have not exhausted their administrative remedies and therefore are not now in a position to do other than to proceed to have their cause heard and thereby exhaust their remedies, and that when such has come about, those things stated above will be immediately set into motion and this cause of action heard.

(3) The Court finds as a fact that Raymond Greenlee and James Bryson, two of the plaintiffs appearing as such in this court, and their associate plaintiffs, Albert Joyner and Lucille Lytle, instituted such action, after having made their request of the School Board in the Superior Court of McDowell County, and that the same was heard by Judge George B. Patton, on a demurrer, and probably other motions. The demurrer was filed for that "There is a defect of parties plaintiff and causes of action." (G.S. 1-127, Secs. 4, 5.), amounting to a misjoinder of both parties and causes of action. This was sustained and such was affirmed by the Su-

preme Court (244 N.C. 164.) for that, "Where there is a misjoinder of both parties and causes of action, the court is not authorized to direct a severance, but must dismiss the action upon demurrer." (G.S. 1-132.) It would therefore appear that if plaintiffs or any of them decide to pursue their remedy further, it would be incumbent upon them to file anew their request with the School Board, and upon it being given an unfavorable consideration, for each to carry his cause to the Superior Court and there, with the privilege of a jury trial, have their cause determined, with the right of an appeal to the Supreme Court of North Carolina if confronted with an adverse verdict; and that if it should then be made to appear that having exhausted their administrative remedies under the North Carolina law, each would then be entitled to have this Court permit an amendment to the complaint or to replead if such seems desirable and to entertain their motion for relief as is prescribed by law.

WHEREUPON, the Court, being of the opinion that the administrative remedies thus provided for have not been exhausted, announces that it will stay proceedings herein until such comes about, and on that being made to appear will order an immediate trial to the end that the deprivation allegedly brought about will be inquired into and the rights of the plaintiffs fully and completely protected.

/S/ WILSON WARLICK

U. S. District Judge

APPENDIX "D"

AN ACT TO AMEND ARTICLE 21, CHAPTER 115 OF THE GENERAL STATUTES, RELATING TO ASSIGNMENT AND ENROLLMENT OF PUPILS IN PUBLIC SCHOOLS.

The General Assembly of North Carolina do enact:

SECTION 1. G.S. 115-176 is hereby amended to read as follows: "Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administration unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this Article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this Section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this Article."

SEC. 2. G.S. 115-177 is hereby amended to read as follows: "In exercising the authority conferred by §115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means, to the parent

or guardian of each child or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit."

SEC. 3. G.S. 115-178 is hereby amended to read as follows: "The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail."

SEC. 4. All laws and clauses of laws in conflict with this Act are hereby repealed.

SEC. 5. This Act shall be effective upon its ratification.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

APPENDIX "E"

IN THE SUPREME COURT OF NORTH CAROLINA

ALBERT JOYNER, LUCILLE LYTLE, JAMES BRYSON AND THURMAN GREENLEE v. THE MCDOWELL COUNTY BOARD OF EDUCATION.

(Filed 23 May, 1956)

APPEAL by petitioners from *Patton, Special Judge,* February Term, 1956, of McDOWELL.

This is a proceeding brought on 27 August 1955 by petitioners who filed with the Board of Education of McDowell County, hereinafter called the Board, a petition "on behalf of their children and themselves, and on behalf of other Negro children and parents similarly situated," in which, in sum and substance, they assert:

(1) That the (unnamed) children for whom they were speaking were eligible to attend public schools in McDowell County, North Carolina, and particularly the school at Old Fort.

(2) That the petitioners carried their children to the Old Fort school on 24 August 1955 and demanded that they then be enrolled in said school; that the principal of said school, acting in conjunction with and under the direction of the Superintendent of Schools of McDowell County, then and there denied to children of petitioners admission to the said Old Fort School.

(3) That the children were denied admission for the reason that school children were "not to be assigned in the schools of McDowell County during the school year 1955-56 on any basis other than that which has previously existed."

(4) That "the primary if not the sole basis upon which children in McDowell County have been assigned to schools has been race or color."

(5) That the Supreme Court of the United States has declared enforced racial segregation in public schools illegal.

(6) That the refusal to admit children of petitioners to the Old Fort school "was based solely and wholly upon race or color."

The petition, following the foregoing allegations sought redress in the following language:

"The undersigned, on behalf of their own children and on behalf of other Negro children and parents similarly situated, petition your Board that you forthwith issue a directive, order or mandate to the aforesaid Superintendent and Principal requiring them forthwith to admit children of petitioners and other Negro children similarly situated to the school and school facilities maintained by your Board in the Town of Old Fort."

The petitioners appeared before the Board on 3 October 1955 in support of their request. In a letter dated 5 January 1956, the petitioners were informed by the secretary of the respondent Board of the Board's denial on 2 January 1956 of petitioners' request to have their children enrolled in the public school in Old Fort, North Carolina. The denial was in the following language:

"A request on the part of Taylor & Mitchell on behalf of the Negroes at Old Fort to allow Negroes to attend school at Old Fort rather than to be transported to Marion to attend school at Hudgins High, was formally denied by virtue of necessity in that facilities and room are available a Hudgins High and are not available at Old Fort. The motion was made by Mr. Ross, seconded by Mr. Greenlee and duly passed."

The petitioners, through their counsel, gave notice of appeal to the Board by telegram on 13 January 1956 and requested the immediate certification of the record to the Superior Court. The record was duly certified as requested.

In apt time, in the Superior Court, the respondent moved to dismiss the appeal on the ground that the notice of appeal was not given or filed within ten days as required by statute. In addition

thereto, the respondent filed a demurrer to the petition and assigned as grounds therefor: (1) that the petition failed to state a cause of action; and (2) that there was a misjoinder of both parties and causes of action.

After hearing argument of counsel for respondent and counsel for petitioners, the court being of the opinion that the motion to dismiss should be denied and that the demurrer should be overruled in so far as it pertains to the failure to state a cause of action, but, that the demurrer as it relates to the misjoinder of parties and causes of action should be sustained, entered judgment accordingly. The petitioners appeal to the Supreme Court, assigning error.

Taylor & Mitchell for petitioners.
Roy W. Davis for respondent.
Attorney-General Rodman, Amicus Curiae, for the State.

DENNY, J. At the threshold of this appeal the Court is confronted with the fact that the questions presented are now academic as to the school year 1955-56. Even so, Chapter 366 of the Session Laws of 1955, codified as G.S. 115-176 through G.S. 115-179, governing the enrollment of pupils in the public schools of North Carolina is of such public importance that the Court deems it appropriate to clarify the procedure thereunder.

The appellants' pertinent assignments of error are directed to the ruling of the court below in sustaining the respondent's demurrer on the grounds of a misjoinder of parties and causes of action and to the failure of the court to order a severance of the causes of action, if the court was correct in its ruling as to such misjoinder.

A demurrer should be sustained and the action dismissed where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases to direct the severance of the respective causes of action for trial under the provisions of G.S. 1-132. *Perry v. Doub*, 238 N.C. 233, 77 S.E. 2d 711; *Sellers v. Ins. Co.*, 233 N.C. 590, 65 S.E. 2d 21; *Erickson v. Starling*, 233 N.C. 539, 64 S.E. 2d 832; *Teague v. Oil Co.*, 232 N.C. 469, 61 S.E. 2d 345;

s.c. 232 N.C. 65, 59 S.E. 2d 2; *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247.

The Court deems it unnecessary to enter into a discussion of the question of misjoinder in this proceeding. The question is settled by the statutes governing the enrollment of pupils in the public schools of North Carolina and, in the opinion of the Court, they do not authorize the institution of class suits upon denial of an application for enrollment in a particular school.

The provisions of G.S. 115-176 read as follows: "The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this article, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education."

It is provided in G.S. 115-178 that, "The parent or guardian of any child, or the person standing *in loco parentis* to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which said child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance

with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school."

The provisions of G.S. 115-179 are as follows: "Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard *de novo* in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions."

With respect to the provisions of G.S. 115-178, this Court construes them to authorize the parent to apply to the appropriate public school official for the enrollment of his child or children by

name in any public school within the county or city administrative unit in which such child or children reside. But such parent is not authorized to apply for admission of any child or children other than his own unless he is the guardian of such child or children or stands *in loco parentis* to such child or children. In the event a parent, guardian or one standing *in loco parentis* of several children should apply for their admission to a particular school, it is quite possible that by reason of the difference in the ages of the children, the grades previously completed, the teacher load in the grades involved, etc., the school official might admit one or more of the children, and reject the others. The factors involved necessitate the consideration of the application of any child or children individually and not *en masse*. Any interested parent, guardian or person standing *in loco parentis* to such child or children, whose application may be rejected, may appeal to the appropriate board for a hearing in accordance with the rules and regulations established by such board. Furthermore, if the board denies the application for admission of such child or children, the aggrieved party may appeal in the manner prescribed by statute (G.S. 115-179) to the superior court, where the matter shall be heard *de novo* before a jury in the same manner as civil actions are tried therein.

Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing *in loco parentis* to any child or children for the admission of such child or children to a particular school, must be prosecuted in behalf of the child or children by the interested parent, guardian or person standing *in loco parentis* to such child or children respectively and not collectively.

The Court notes that the petitioners did not apply for the admission of their children and other Negro children similarly situated to the school in Old Fort until the 24th day of August 1955, the day the school opened. It would seem that some rule or regulation might well be promulgated by the county and city boards of education fixing a date reasonably in advance of the opening of school for filing such applications. Judicial notice will be taken of the fact

that boards of education must of necessity employ teachers in advance of the opening of school. Teachers are assigned to their particular schools on the basis of the enrollment information in the hands of the respective boards at the time the assignments are made. Hence, it would seem to be extremely desirable if not imperative for the orderly operation of the schools that applications for admission to schools other than those theretofore designated by the board of education or city administrative unit, be made reasonably in advance of the opening of school.

In addition to the assignment of pupils in the manner authorized in the above cited statutes, pupils residing in one administrative unit may be assigned to a school in another administrative unit, pursuant to the provisions contained in Chapter 1372, Session Laws of 1955, sub-chapter VIII, Art. 19, sec. 3, codified as G.S. 115-163. *In re Assignment of School Children,* 242 N.C. 500, 87 S.E. 2d 911.

An additional reason why this proceeding was properly dismissed is that while it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is in effect an application for *mandamus,* requiring the immediate integration of all Negro pupils residing in the administrative unit in which the Old Fort school is located, in the Old Fort school. Such a procedure is neither contemplated nor authorized by statute. Therefore, the appeal is dismissed.

Appeal dismissed.

DEVIN, J., took no part in the consideration or decision of this case.

APPENDIX "F"

TAYLOR & MITCHELL
Attorneys at Law
125 E. Hargett Street
Raleigh, N. C. Telephone: 3-3171

Herman L. Taylor
Samuel S. Mitchell

July 11, 1956

Mr. Melvin H. Taylor, Superintendent
McDowell County Schools
Marion, North Carolina

Dear Sir:

On behalf of the Negro citizens in and around Old Fort, whom we represent, we write to inquire as to what specific steps the McDowell County Board of Education has taken and is taking with reference to making provision for the admission of qualified Negro children to the public school maintained in the Town of Old Fort for the school year 1956-57, pursuant to the decisions of the United States Supreme Court.

An immediate reply to this inquiry will be appreciated.

Very truly yours,
TAYLOR & MITCHELL,
By: Herman L. Taylor

HLT:lhj

COUNTY OF MCDOWELL
Superintendent of Public Instruction
Marion, N. C.

July 13, 1956

Taylor & Mitchell
125 East Hargett St.
Raleigh, North Carolina

Re: *Old Fort Negro Citizens and Pupils*

Gentlemen:

In reply to your letter of July 11, 1956 in which you "inquire as to what specific steps the McDowell County Board of Education has taken and is taking with reference to making provision for the admission of qualified Negro children to the public school maintained in the Town of Old Fort for the school year 1956-57, pursuant to the decisions of the United States Supreme Court.", please allow me to advise you that inasmuch as no Negro pupil has made application, nor has any parent or person standing *in loco parentis* made application for any Negro child to attend school in the town of Old Fort for the school year 1956-57, the Board has had no cause to take any action in this connection.

Sincerely,
MELVIN H. TAYLOR,
Superintendent

MHT:zj
cc: Mr. Roy Davis
Mr. E. P. Dameron

No. 748

MAR 2 1957
JOHN T. FEY, Clerk

In The

Supreme Court of the United States

October Term, 1956

Lionel C. Carson, Infant, By His Next Friend, Martin A. Carson, et al., Petitioners,

v.

Honorable Wilson Warlick, United States District Judge for the Western District of North Carolina, Respondent.

Brief for Respondent Opposing Petition for Writ of Certiorari.

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In The

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Lionel C. Carson, Infant, By His Next Friend, Martin A. Carson, et al., Petitioners,

v.

Honorable Wilson Warlick, United States District Judge for the Western District of North Carolina, Respondent.

Brief for Respondent Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Negro plaintiffs brought suit against the Board of Education of McDowell County, North Carolina in August, 1953, alleging discrimination in public school facilities available to the Negro plaintiffs. This suit was filed prior to the first decision in the school segregation case, *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873, and one of the prayers for relief was that defendants be required to provide for plaintiffs educational facilities equal to those provided for white children.

In August, 1955, after the second decision of this Court in the *Brown* case, this action came on for trial in the district court and defendants moved for judgment on the pleadings, contending that the complaint stated no cause of action at

that time as the decision of the Supreme Court had made inappropriate the relief (separate but equal rule application) sought by the plaintiffs. In his judgment signed August 9, 1955, the district judge granted the defendant's motion and dismissed the action.

The order of dismissal was appealed to the Court of Appeals for the Fourth Circuit, which, in a per curiam decision filed December 1, 1955, said: "While the decision of the Supreme Court unquestionably made inappropriate the relief asked as to the provision of a separate school for Negro children in the town of Old Fort, the same cannot be said as to the other relief asked in the complaint." The order of dismissal was vacated and the case remanded to the district court, to be considered "in the light of the decision of the Supreme Court in the school segregation case and of the North Carolina statute above mentioned and with power to stay proceedings therein pending the exhaustion of administrative remedies under the statute, and to order a repleader if this may seem desirable." *Carson, et al, v. Board of Education of McDowell County,* 227 F. 2d. 789.

Meanwhile, some of the plaintiffs in this action filed a petition with the defendant school board, on August 27, 1955, on behalf of themselves and others, asking that petitioners and others similarly situated be admitted "forthwith" to the school maintained in Old Fort. This petition was denied by the board and appeal was taken by the Negro petitioners, under the State assignment statute, G. S. 115-178, et seq., to the State courts. The State trial court dismissed the action on the ground of misjoinder of causes and parties, and the dismissal was affirmed by the Supreme Court of North Carolina in May, 1956. *Joyner v. McDowell County Board of Education,* 244 N. C. 164, 92 S. E. 2d 795. In its decision, the Supreme Court of North Carolina held that the joint petition proceeding was not authorized by statute: ". . . While it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is, in effect, an application for mandamus, requiring the immediate integration of all Negro pupils residing in

the administrative unit in which the Old Fort school is located, in the Old Fort school."

In the proceedings in the State courts, the petitioners raised no question about the constitutionality of the pupil assignment statute.

Without attempting to comply with the provisions of the statute, as interpreted by the Supreme Court of North Carolina, the petitioners, on July 12, 1956, moved to file a supplemental complaint, asking to proceed without reference to administrative remedies under the pupil assignment statute. The motion to amend was denied by the District Judge on the grounds that petitioners had not exhausted their administrative remedies.

Thereafter, on August 15, 1956, the petitioners asked the Court of Appeals for the Fourth Circuit for a writ of mandamus directing the district judge to allow amendment of pleadings.

The Court of Appeals denied the writ of mandamus and the petitioners seek review and reversal of that decision.

ARGUMENT

I.

THE NORTH CAROLINA PUPIL ASSIGNMENT STATUTE IS NOT UNCONSTITUTIONAL ON ITS FACE.

At the 1955 sesssion of the North Carolina General Assembly, following the first decision of this Court in the school segregation case, Chapter 115 of the General Statutes (pertaining to public schools) was rewritten, and the statutory requirement of separate schools for white and colored children was deleted. Full and complete authority in assignment of children to the public schools, without regard to race, was vested in the State's 174 county and city school boards.

By the terms of Section 115-176 of the North Carolina General Statutes, each county and city school board is directed by the statute to make assignments of pupils to the public schools so as to provide *for the orderly and efficient administration of the public schools,* and provide *for the effective instruction, health, safety, and general welfare of*

the pupils. This statute further provides that each school board may adopt such reasonable rules and regulations as are necessary in the administration of the pupil assignment responsibilities.

With respect to reassignment of pupils dissatisfied with an assignment previously made by the board, Section 115-178 sets forth in detail the reasonable and adequate provision for application for reassignment, for a prompt and fair hearing before the school board, and for a prompt decision upon the hearing. This statute prescribes that on any application for reassignment the school board must act in the *best interest of the child,* that the factors of *proper administration of the school, proper instruction of the pupils,* the *health* of the children enrolled, and the *safety* of the children in the school are to be taken into account.

This is the State statute which petitioners assert is void on its fact, as a grant of arbitrary power to the administrative agencies, the school boards. It should not be necessary to argue this point. In countless instances, this Court has upheld statutes containing administrative standards no more definite, or not as much so, as are found in North Carolina's pupil assignment statute.

The Fair Labor Standards Act (29 USC §§ 201-219), with respect to fixing minimum wages for employees engaged in production of goods for interstate commerce provides that the administrative agencies shall consider "among other relevant factors," *competitive conditions, wages established by collective bargaining contracts, and wage scales established voluntarily by employers.* The act does not prescribe the relative weight to be given these various factors or to the other "relevant factors."

Yet this was not an unlawful delegation of power by the Congress to administrative agencies. The standards were not arbitrary. The statute was not void on its face. *OPP Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor,* 312 U. S. 126, 61 S. Ct. 524, 85 L. ed. 624 (1940).

This Court has held on more than one occasion that in order to avoid an unconstitutional delegation of power it is *not* necessary that the legislative body supply administrative

officials with a specific formula for their guidance in a field where flexibility and adaptation to infinitely variable conditions constitute the essence of administrative action. *Lichter v. United States,* 334 U. S. 742, 68 S. Ct. 1294, 92 L. ed. 1694; *United States Ex Rel Knauff v. Shaughnessy,* 338 U. S. 537, 70 S. Ct. 309, 94 L. ed. 317.

In the proceedings in the North Carolina Courts, *Joyner et al. v. Board of Education of McDowell County,* 244 N. C. 164, pertaining to the pupil assignment statute in question, the plaintiffs raised no question at all about an unconstitutional and arbitrary grant of power to the school boards, although the plaintiffs had the opportunity to do so and the State Courts had the power to pass on the question.

The assignment statute, G. S. 115-176 et seq. is clearly constitutional on it face, and, as the Court of Appeals' opinion stated, "whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked."

II.

THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH BROWN v. BOARD OF EDUCATION, 349 U. S. 294; 347 U. S. 483.

The petition for the writ of certiorari asserts that the decision of the Court of Appeals in denying the writ of mandamus is "in irreconcilable conflict" with the decisions of this Court in *Brown et al. vs. Board of Education.*

The Court below declined to order the District Judge to allow the petitioners to file supplemental pleadings, and declined to order the District Judge to proceed with the cause "as though the Pupil Enrollment Act had never been enacted."

The Court below held that the petitioners had not exhausted their administrative remedies before the McDowell County School Board, and for this reason they were not entitled to the relief which they asked.

There is nothing in the *Brown* decisions which even remotely can be construed as abolishing the well-established rule of procedure that administrative remedies should be exhausted before coming into the federal court complaining of

state action. Indeed, the second *Brown* decision, 349 U. S. 294, 299 says:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

The petitioners advance the unsupportable theory that the doctrine of exhaustion of administrative remedies does not apply to a "civil rights action." *Lane v. Wilson,* 307 U. S. 268, (denial of voting rights of colored citizen of Oklahoma) is authority to the contrary.

There is nothing in the decision of the Court below which is in conflict with the *Brown* decisions.

III.

THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE FIFTH, SIXTH AND EIGHTH CIRCUITS.

The petitioners contend the decision of the Court below is "directly in conflict" with decisions of the Courts of Appeals for the Fifth, Sixth and Eighth Circuits, citing the cases discussed below.

In *Clemons et al. v. Board of Education of Hillsboro, Ohio, et al.,* 228 F. 2d 853 (6th Cir. 1955), the opinion states:

> "The District Court denied the relief prayed for upon the ground that it would seriously disrupt the orderly procedures and administration of Washington and Webster Schools if an injunction were granted in the case. It held that under Ohio law, as well as under *The Hecht Company v. Bowles,* 321 U. S. 321, the exercise of discretionary powers of the Board should not be interfered with. This conclusion is clearly erroneous and constitutes an abuse of discretion on the part of the District Court."

The Court of Appeals determined that the district judge in the *Clemons* case abused his discretion in view of his own finding that the school board had established for the first

time a zoning scheme as a subterfuge to segregate Negro children previously admitted to predominantly white schools.

The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the Clemons case.

In *Brown et al. v. Rippy*, 233 F. 2d 796 (5th Cir. 1956), the Court of Appeals reversed a district court decision in which the judge had found that public school facilities furnished colored children were equal to those furnished white children, the district court decision stating: "All of the law as declared by the various courts appellate and trial, in the United States, are agreed upon the proposition that when similar and convenient free schools are furnished to both white and colored that there then exists no reasonable ground for requiring desegregation." This district court decision was rendered September 16, 1955, and upon appeal, the Court of Appeals held, "We think it quite clear that there is no basis in the evidence for the action taken by the district judge, none in law for the reasons given by him in support of his action."

The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the Brown v. Rippy case.

In *Jackson et al. v. Rawdon*, 235 F. 2d 93 (5th Cir. 1956), the decision of the Court of Appeals relates that the defendant school board "had taken definite action to continue segregation here throughout the coming school year," and that is its asserted intention.

The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the Jackson v. Rawdon case.

In *Brewer et al. v. Hoxie School District*, 238 F. 2d 91 (8th Cir. 1956), the Court of Appeals affirmed an order of the district court which enjoined defendants from,

> "interfering by acts of trespass, boycott or picketing with the free operation of schools within plaintiff's jurisdiction; from in any manner deterring the attendance at school of children within said school district and from in any manner threatening or intimidating the individual plaintiffs; from taking any acts of any kind whatsoever

which seek to compel by force, intimidation, threats or violence a recession of the orders heretofore made integrating the public schools of Hoxie."

The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the Brewer v. Hoxie case.

The decision of the Court below is not in conflict with decisions of the Courts of Appeals for the Fifth, Sixth and Eighth Circuits.

IV.

THE WRIT OF MANDAMUS DOES NOT LIE TO REVIEW A DISCRETIONARY DECISION OF A LOWER COURT WHEN THE MATTER OF DECISION IS WITHIN THE JURISDICTION OF THE LOWER COURT.

The petitioners are asking this Court to review and reverse the decision of the Court of Appeals below which denied a writ of mandamus against the District Judge.

In effect, the petitioners are now asking this Court to grant the writ of mandamus which the Court of Appeals denied. The petitioners are in effect asking this Court to order the District Judge to allow the supplemental pleading to be filed.

It is well settled that allowance of a motion to file a supplemental pleading is within the sound discretion of the presiding judge, and, in the absence of an error of law, the trial judge's allowance or refusal of motion to file a supplemental pleading is not reviewable on appeal. Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 1, Sec. 445. The writ of mandamus does not lie to require a federal trial court to allow amendment of pleadings, Annotation, 98 L. ed. 114, 125. See Rule 15(d), Federal Rules of Civil Procedure.

The impropriety of the writ of mandamus to compel a lower court to exercise judicial discretion in a particular manner has been asserted by this Court in several cases. *In Re Parsons*, 150 U. S. 150 (1893); and *Ex Parte Railway Co.*, 101 U. S. 711 (1879), and cases cited therein.

In a recent decision, this Court refused to issue a writ of

mandamus directing a district judge to change his discretionary order setting counsel fees. This Court said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . as extraordinary remedies, they are reserved for really extraordinary causes." Ex Parte *Fahey*, 332 U. S. 258, 67 S. Ct. 1558, and 91 L. ed. 2041.

The District Judge below, in denying petitioners' motion to amend their complaint, did not exceed his jurisdiction or commit an error of law, and the Court of Appeals ruled correctly in refusing to grant this "extraordinary remedy."

This Court should not now, in effect, grant the writ of mandamus which was denied by the Court of Appeals, by reviewing and reversing the decision below.

CONCLUSION

The questions presented by the petition for writ of certiorari are not substantial questions, any more than the same questions raised in *Hood v. Board of Trustees of Sumter County School District*, 232 F. 2d 626 (4th Cir. 1956), *cert. denied*, 352 U. S. 870, 77 S. Ct. 95, 1 L. ed. 2d 76 (Oct. 15, 1956).

The petition should be denied.

Respectfully submitted,

ROY W. DAVIS,
Counsel for Respondent

GEORGE B. PATTON,
Attorney General of North Carolina

ROBERT E. GILES,
Assistant Attorney General

WILLIAM T. JOYNER,
Of Counsel

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 748

LIONEL C. CARSON, INFANT, BY HIS NEXT FRIEND, MARTIN A. CARSON, ET ALS., *Petitioners,*

vs.

HONORABLE WILSON WARLICK, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA, *Respondent.*

REPLY BRIEF TO BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

Petitioners herein file this Reply Brief in this cause as a response to the Opposing Brief of Respondent and pray the Court to consider this Reply Brief along with their Petition for Writ of Certiorari.

I

THE PETITIONERS' APPLICATION FOR WRIT OF MANDAMUS IN THE COURT BELOW WAS NOT DIRECTED AT THE EXERCISE OF JUDICIAL DISCRETION BY THE DISTRICT COURT, AS INTIMATED BY RESPONDENT IN HIS OPPOSING BRIEF, BUT IT WAS DIRECTED TOWARD THE CORRECTION OF ABUSIVE AND PALPABLE ERRORS OF LAW WHICH, THOUGH NOT APPEALABLE TO THE COURT OF APPEALS, WERE NONETHELESS HIGHLY PREJUDICIAL AND INJURIOUS TO EQUITABLE AND CONSTITUTIONAL RIGHTS OF THE PETITIONERS AND WHICH MERITED CORRECTION BY WRIT OF MANDAMUS.

The Respondent, in Argument IV of his Opposing Brief, states: "In effect, the petitioners are now asking this Court to grant the writ of mandamus which the Court of Appeals denied. The petitioners are in effect asking this Court to order the District Judge to allow the supplemental pleading to be filed." (Opposing Brief, Page 8). This erroneous and short-sighted view of petitioners' proceeding in the Court of Appeals is also reflected in the Statement of the Case in Respondent's Opposing Brief where he represents to this Court, ". . . the petitioners asked the Court of Appeals for the Fourth Circuit for a writ of mandamus directing the district judge to allow amendment of pleadings." (Opposing Brief, Page 3). Respondent is obviously attempting to convey to this Court the erroneous and self-serving impressions: (1) that petitioners complained in the Court of Appeals for the Fourth Circuit of the legitimate exercise of judicial discretion by the Respondent, as District Judge, (2) and that the petitioners sought in the Court of Appeals a writ of mandamus for the purpose of controlling the Respondent's discretionary power as District Judge. Indeed, Respondent troubled himself in his Opposing Brief by citation of authority presumably supportive of these "straw issues." A reading of Petitioners' Application for Writ of Mandamus, as presented to the Court of Appeals below, is enough to unmask these distorted notions which Respondent attempts to project concerning petitioners' proceeding in the Court of Appeals. See Application for Writ of Mandamus in the Record as certified by the Clerk of the Court of Appeals for the Fourth Circuit.

In their Application for Writ of Mandamus in the Court below the petitioners specifically prayed: "(3) That a Writ of Mandamus issue from this Court directing the Honorable District Judge to execute the mandate of this Court, to vacate his order of July 26, 1956, staying proceeding in this cause, to proceed with this cause as though the Pupil Enrollment Act had never been enacted, to proceed with this cause under the theory that plaintiffs have no adequate administrative remedy and to grant plaintiffs leave to file their proposed supplemental pleadings. (4) That plaintiffs have such additional relief and process as may be necessary and

appropriate in the premises." See Page 17 of the Application for Writ of Mandamus. This, without more, belies Respondent's convenient adoption in this Court of the contentions that petitioners complained of and sought to control Respondent's exercise of legitimate judicial discretion.

Moreover, it is respectfully submitted that Respondent should not be allowed in this Court to extract from his Order of July 26, 1956, the substantive, crippling and palpable errors therein contained by the convenient contrivance of labeling his ruling as a mere exercise of judicial discretion. It should be observed that Respondent's Order of July 26, 1956, concludes with the following peremptory language: "Wherefore, the Court being of the opinion *that the administrative remedies thus provided for have not been exhausted, announces that it will stay proceedings herein until such comes about* and on that being made to appear will order an immediate trial to the end that the deprivation allegedly brought about will be inquired into and the rights of the plaintiffs fully and completely protected." (Emphasis added.) See Page 24, Petition for Writ of Certiorari, where the Respondent's Order of July 26, 1956, is reproduced. With this Order in mind, it is inconceivable that Respondent could have justifiably supposed that he was merely exercising a judicial discretion relative only to the filing of supplemental pleadings. It is further observed that the Respondent's stay of proceeding, pending exhaustion of so-called administrative remedies, is the law of this case unless his ruling is altered by this Court.

Finally, the Court of Appeals below did not subscribe to the notions that the petitioners were complaining of and seeking therein to control Respondent's discretionary power. In stating the case made by petitioners upon their Application for Writ of Mandamus, the Court of Appeals for the Fourth Circuit said:

> "The applicants did not attempt to comply with the provisions of the statute as so interpreted by the Supreme Court of North Carolina, but on July 11, 1956, counsel who are representing them before this court wrote a letter to the secre-

tary of the Board of Education, inquiring what steps were being taken for the admission of Negro children to the Old Fort School. The secretary replied that 'inasmuch as no Negro pupil has made application, nor has any parent or person standing in loco parentis made application for any Negro child to attend school in the town of Old Fort for the school year 1956-57, the Board had had no cause to take any action in this connection.

"Upon receiving this reply, applicants here, plaintiffs in the court below, on the 12th day of July 1956 moved in the action there pending to file a supplemental complaint in which, without alleging compliance with the requirements of the North Carolina statute as interpreted by the Supreme Court, they asked a declaratory judgment and injunctive relief with respect to their right to attend the Old Fort School. The District Judge denied the motion on the ground that plaintiffs had not exhausted their administrative remedies and stayed proceedings in the cause until same should be exhausted, but stated that, as soon as it was made to appear that they had been exhausted, he would grant such relief as might be appropriate in the premises, . . ."

"Upon the denial of the motion, application for writ of mandamus was filed here to require the District Judge to vacate the order staying proceedings, to allow the supplemental pleading to be filed and to proceed with the cause 'as though the Pupil Enrollment Act had never been enacted.'" Appendix "A," Pages 16 and 17.

See Opinion of the Court of Appeals, Pages 16 and 17 of Petition for Writ of Certiorari and *Lionel C. Carson et als. vs. Honorable Wilson Warlick, No. 7281,* 238 F. 2d 724. Again, the Court of Appeals ruled upon all of the issues presented by petitioners, holding that, "Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board." Thus, it overwhelmingly appears that petitioners complained in the court below of errors of law rather than

of Respondent's exercise of judicial discretion; that Respondent, as District Judge, made peremptory rulings of law rather than a mere ruling disallowing the filing of supplemental pleading; and that the court below presumably undertook to review and resolve decisive legal questions involved rather than mere discretionary functions of the District Court.

Petitioners further submit that the following authorities are controlling on the question of the availability of mandamus for the purpose for which petitioners sought extraordinary relief: *McClellan v. Carland*, 217 U.S. 283, 30 S.Ct. 501, 54 L.ed. 762, where mandamus was held the proper remedy to dissolve an improper stay of proceeding; *Ex Parte Simmons*, 247 U.S. 231, 38 S.Ct. 487, 62 L.ed. 1094, where mandamus issued to prevent severance of an action containing two counts, by which device the trial court presumed to retain one count for trial by jury as a suit at law and to transfer the other count to the equity docket; 28 U.S.C. 1651. See also *Re Frank D. Winn*, 213 U.S. 458, 29 S.Ct. 515, 53 L.ed. 873; *Ex Parte United States*, 242 U.S. 27, 37 S.Ct. 476, 61 L.ed. 129; *Delaware Lackawanna & Western Railroad Company v. John Rellstab*, 276 U.S. 1, 48 S.Ct. 203, 72 L.ed. 439; *Ex Parte Edelstein*, (C.C. 2nd), 30 F. 2d 636.

II

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR OTHER CIRCUITS AND IS NOT RECONCILABLE WITH THE DECISIONS OF OTHER CIRCUITS, AS INTIMATED BY RESPONDENT IN HIS OPPOSING BRIEF.

In his Opposing Brief, Respondent repeatedly asserts and underscores the proposition that "The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the" cases cited by petitioners in their Petition. The assertion is directed toward petitioners entreaty that the Court

issue the Writ of Certiorari to resolve a conflict between the Courts of Appeals on the question of the applicability of the doctrine of exhaustion of administrative remedies.

Respondent does not address himself to the petitioners' contention that the Court of Appeals for the Fourth Circuit is in conflict with other circuits in failing to enforce the duty of first instance compliance upon school authority to de-segregate their school. Respondent merely distinguishes the instant case from cases decided by other circuits upon the untenable and immaterial grounds that the so-called administrative remedies in North Carolina are expressly of state statutory origin. Nevertheless, assignment of public school pupils by administrative agents to segregated schools was involved in each of the cases cited by petitioners as examples of cases where exhaustion of so-called administrative remedies was not required. In each case contention was made by school authorities that the action was premature or precipitate, in view of administrative considerations and problems. And in *Brown et al. v. Rippy et al.* (C.A. 5th), 233 F. 2d 796, Judge Cameron expressly dissented upon the grounds that administrative remedies had not been exhausted. We are not told what mysterious power to abridge petitioners' constitutional rights is conferred by enactment of a statutory scheme, the obvious purpose of which is to circumvent the ruling of this Court. Moreover, in a recently decided Louisiana case, *Bush v. Orleans Parish School Board,* (C.A. 5th), ... F. 2d ....., the Court of Appeals for the Fifth Circuit has discounted and held unconstitutional a pupil assignment statute very similar to the North Carolina pupil assignment scheme and has held inapplicable a statutory plan for delay in de-segregating public schools via invocation of the doctrine of exhaustion of administrative remedy. Finally, the very recent decision in the *Bush Case, supra,* leaves no doubt of the *conflict between the Fourth and Fifth Circuits* upon the question of the applicability of the doctrine of exhaustion of administrative remedies to public school de-segregation cases.

But assuming against fact that the question of exhaustion of administrative remedies *under a pupil assignment statute* is first

met in North Carolina and in this Circuit, such a circumstance would not mitigate against the propriety of certiorari but would rather render certiorari even more appropriate, in that the Court of Appeals for the Fourth Circuit would have "decided an important question of federal law which had not been, but should be, settled by this Court," Rule 19, Revised Rules of the Supreme Court of the United States. See *New York v. United States,* 326 U.S. 572, 66 S.Ct. 310, 90 L.ed. 326; *United States v. Petty Motor Company,* 327 U.S. 372, 66 S.Ct. 596, 90 L.ed. 729, where certiorari issued under this phase of Rule 19.

CONCLUSION

It is respectfully submitted that the proceeding in the Court below for a writ of mandamus was not directed at the exercise of judicial discretion by the District Court but that it was directed toward correction of abusive, palpable and unappealable errors of law committed by Respondent as District Judge; that nothing appearing in the Records certified to this Court or in the Respondent's Opposing Brief emaciates petitioners' prayer in this Court for a Writ of Certiorari; and that the case made by petitioners in their Petition for Writ of Certiorari and by the Records and lower Court Opinions in this cause more than justify the issuance by this Court of a Writ of Certiorari to review the Order and Decision of the United States Court of Appeals for the Fourth Circuit.

Herman L. Taylor
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TAYLOR & MITCHELL, *Of Counsel*